

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

SWIFT FLOORING)
CONTRACTING, LLC,) C.A. No K10L-02-006 (JTV)
)
Plaintiff,)
)
v.)
)
ZECCOLA BUILDERS, INC.,)
BERNARD J. CRIST, MOLLEY A.)
CRIST, L & D DEVELOPMENT,)
CORP.,)
)
Defendants.)

Submitted: August 13, 2010
Decided: September 15, 2010

Patrick Scanlon, Esq., Milford, Delaware. Attorney for Plaintiff.

David J. Weidman, Esq., Hudson, Jones, Jaywork & Fisher, Georgetown, Delaware. Attorney for Defendants Bernard and Molley Crist.

William D. Sullivan, Esq., Sullivan, Hazeltine, Allinson, Wilmington, Delaware. Attorney for Defendants Zeccola Builders and L & D Development.

Upon Consideration of Plaintiff's
Motion To Strike
DENIED

VAUGHN, President Judge

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OPINION

This is a mechanics' lien action in which two of the defendants, Bernard J. and Molly A. Crist, have raised the "homeowners' defense." The plaintiff has moved to strike this defense.

FACTS

On May 31, 2009 Zeccola Builders, Inc., as seller, and Bernard J. and Molly A. Crist, as buyers, entered into a written agreement under which Zeccola agreed to build a home, The Avalon, on a lot in or near Magnolia, Delaware, and, upon completion, sell the house and lot to the Crists. At the time, title to the lot was actually held by L & D Development Corp., but that corporation's name does not appear in the agreement.

Zeccola proceeded with construction and the plaintiff, Swift Flooring, LLC, was one of the subcontractors. During the period which Swift supplied its labor and materials, title to the property remained in L & D. Swift commenced supplying its labor and materials on October 29, 2009 and finished on November 13, 2009.

The house was completed and settlement between Zeccola and the Crists occurred on November 25, 2009. On that date L & D conveyed title to the property by deed to the Crists. The Crists made final payment to Zeccola in exchange for a release of mechanics' liens, which, for purposes of this motion, appears to be in good and standard form, certifying that all subcontractors had been paid. The Crists took possession and occupied the premises as their residence.

On February 2, 2010, after the Crists completed settlement on their home, Swift filed this mechanics' lien action, claiming that it was still owed money for its

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labor and materials.

STANDARD OF REVIEW

In a motion to strike an affirmative defense the court examines the record under the same standard as that for a motion to dismiss; therefore, “all factual allegations of the complaint are accepted as true.”¹ A complaint will not be dismissed under Superior Court Rule 12(b)(6) “unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief.”² Therefore, the court must determine “whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”³

DISCUSSION

The defense which the Crists seek to assert is an affirmative defense set forth in *25 Del. C. § 2707*. It is titled “Payment of contractor by owner of residence as a defense; certification of payment for labor and materials or release of liens by contractor.” The section provides:

No lien shall be obtained under this chapter upon the lands, structure, or both, of any owner which is used solely as a residence of said owner when the owner has made either full or final payment to the contractor, in good faith, with whom he contracted for the construction, erection,

¹ *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. 1972), *aff'd*, 297 A.2d 37 (Del. 1972).

² *Id.*

³ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

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building, improvement, alteration or repair thereof. Prior to or simultaneous with the receipt of any full or final payment by the contractor, the contractor must provide the owner either:

(1) A notarized, verified written certification that the contractor has paid in full for all labor performed and materials furnished to the date of such full or final payment in or for such construction, erection, building, improvement, alteration or repair or

(2) A written release of mechanics' liens signed by all persons who would otherwise be entitled to avail themselves of the provisions of this chapter, containing a notarized, verified certification signed by the contractor that all of the persons signing the release constitute all of the persons who have furnished materials and performed labor in and for the construction, erection, building, improvement, alteration and repair to the date of the release and who would be entitled otherwise to file mechanics' liens claims. . . .⁴

This defense seeks to eliminate the harsh result of double liability against residential homeowners; however, the statutory scheme should also protect the suppliers of labor and material.⁵ The plaintiff contends that the homeowners' defense is not available to the Crists because they were not the homeowners at the time its

⁴ 25 *Del. C.* § 2707.

⁵ *Masten Lumber & Supply Co. v. Brown*, 405 A.2d 101, 104 (Del. 1979) (“[T]he General Assembly did not repeal the existing Mechanics’ Lien Law and adopt the New York System when it passed §2707. Instead, the General Assembly sought to modify the existing Law to eliminate the harsh results that occurred under it.”).

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labor and materials were supplied. It is the plaintiff's position that L & D was the owner at the time the materials were supplied and did not use the premises as its "residence"; therefore, §2707 does not apply. Additionally, it contends that the term "owner," as it appears in §2707, applies only to the owner at the time the labor and materials are being supplied, and not a subsequent owner to whom the premises are conveyed after the work and labor are finished.

The plaintiff relies primarily upon the case of *State v. Tabasso Homes, Inc.*⁶ In that case, Tabasso Homes, Inc. was the owner of a lot. It entered into an agreement with Edwar W. Warrington and his wife (not named) to build a house for them on the lot and convey the house and lot to them upon completion. Tabasso received money from the Warringtons during the course of construction and allegedly failed to use the money to pay subcontractors. The case is a criminal case in which Tabasso was indicted for allegedly violating a statute which declared such funds, used to pay subcontractors, trust funds and imposed criminal penalties upon certain persons who failed to pay subcontractors. Specifically, the statute imposed liability upon an "architect, engineer, contractor or sub-contractor" who failed to properly apply such funds. Tabasso contended that the statute did not apply to it, because it was the "owner" of the lot in question when the unpaid labor and materials were supplied, as opposed to being a "contractor"; and an "owner" was not one of the types of persons to whom the statute applied. The court agreed and dismissed the indictment.

The other cases cited by the plaintiff held that the mechanics' lien statute's

⁶ 28 A.2d 248 (Del. Gen. Sess. 1942).

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requirement that the owner or reputed owner be named in the Statement of Claim means the owner or reputed owner at the time the labor and material were supplied.⁷

None of the cases relied upon by the plaintiff, however, involved the homeowners' defense. While they may be correct within their contexts, I am not persuaded that the rationale of any of them transfers to the homeowners' defense statute involved here. The terms of the statute provide that it applies where: (1) an owner; (2) who uses the structure solely as his residence; (3) has made final payment; (4) in good faith; and (5) to the contractor with whom he contracted for the construction of said structure. None of the elements require the owner to have owned the residence at the time the labor and materials were supplied by the subcontractor. I believe that the plaintiff's contention attempts to add an element to the defense which is not required under the statute. This Court has previously held that "residence" includes a building under construction which is intended to become the future dwelling of the owners for whom the building is being constructed.⁸ Similarly, I find that "owner" includes homeowners' who take title after the construction has been completed. Here, for purposes of this motion, it appears that all of the elements of the defense are present, to-wit: the Crists are (1) owners; (2) who allegedly use the structure solely as their residence; (3) and allegedly made final payment; (4) in good

⁷ *First Fla. Bldg. Corp. v. Robino-LADD*, 424 A.2d 32 (Del. Super. 1980); *Carswell v. Patzowski*, 55 A. 342 (Del. Super. 1903). The plaintiff correctly recognizes that a person who becomes an owner after the furnishing of labor and materials has been completed but before the action is commenced, as occurred here, is also a necessary party.

⁸ *Id.* at *2.

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faith; and (5) to the contractor (Zeccola) with whom they contracted for the construction of said structure.

For these reasons, the plaintiff's motion to strike the affirmative defense is ***denied.***

IT IS SO ORDERED.

 /s/ James T. Vaughn, Jr.

cc: Prothonotary
Order Distribution
File